IN THE

Supreme Court of the United States

October Term, 1971

No. 71-871

FREDERICK PORDUM,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDICES

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Buffalo, New York 14203.

BATAVIA TIMES, LAW PRINTERS,
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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 18, 1971, and decision denying rehearing entered on December 6, 1971.

Opinions Below

There was no reported opinion rendered by the District Court for the Western District of New York. The opinion of the Court of Appeals, attached Appendix D p. 21a has not yet been printed. The decision and the denial of the request for a rehearing are also attached as Appendix D and G p. 21a and 33a respectively.

Jurisdiction

The judgment of the United States Court of Appeals was entered on November 18, 1971, petition for rehearing denied on December 6, 1971. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Questions Presented

1. Did the indictment, for violating the Travel Act, 18 U. S. C. § 1952, conflict with the recent decision of this Court in *Rewis v. U. S.*, decided April 5, 1971.

2. Should a Federal conviction stand based solely on the uncorroborated testimony of one alleged accomplice.

3. Should a matter that is essentially an alleged state crime be tried in Federal Court under Federal Rules.

4. Did the trial judge commit reversible error when he did not inform the jury of the rules of the Erie County Legislature, as the jury requested.

Statutes Involved

TITLE 18 U. S. C. § 371. CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES.

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

TITLE 18 U. S. C. § 1952 INTERSTATE AND FOREIGN TRAVEL OR TRANSPORTATION IN AID OF RACKETEERING ENTERPRISES.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

N. Y. PENAL LAW § 105.05 CONSPIRACY IN THE THIRD DEGREE.

A person is guilty of conspiracy in the third degree when, with intent that conduct constituting a felony be performed, he agrees with one or more persons to engage in or causes the performance of such conduct.

Conspiracy in the third degree is a class A misdemeanor.

N. Y. Penal Law § 200.10 Bribe Receiving.

A public servant is guilty of bribe receiving when he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

Bribe receiving is a class D felony.

N. Y. Criminal Procedure Law § 60.22 Rules of Evidence; Corroboration of Accomplice Testimony.

1. A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense.

Statement of the Case

A bond issue of fifty-million dollars ($50,000,000.) for a dome stadium was approved by the Erie County Legislature on January 7, 1969. The architectural firm of Turley, Stievater, Walker, Mauri and Associates of Buffalo, New York, were retained by the County to do the plans and specifications. That firm then retained Wilson, Morris, Crane & Anderson and Lloyd, Morgan & Jones both firms of Houston, Texas to assist in the design of the dome. A standard contract of the type approved by the American Institute of Architects was entered into between the County and the architects.

J. Lloyd Walker, a member of the Buffalo firm, was designated by them as the legislative representative. He attended many committee meetings and general meetings of the County Legislature, and got to know the members and their functions. Testimony at trial indicated Walker lived a fairly high style of life and drank heavily during this time.

J. Lloyd Walker claims that the defendants, Pordum and Ludera, came to him in January of 1970, and told him they wanted one hundred thousand dollars ($100,000.), to go along with the stadium. Walker testified that he negotiated the matter with the defendants and then told his partners that they would have to come up with some forty thousand dollars ($40,000.), to be given to him for him to pass on to the defendants. Walker did receive the money from his partners and from members of the other two firms. In fact the local District Attorney, Michael F. Dillon, has indicted them for it despite the immunity they received from the Government in this case.

Walker testified that he passed the money he received on to the defendants in cash. There is no evidence, either direct or indirect, to substantiate this claim other than Walker's assertions. No member of the architectural firms during conversations with the defendants at legislative meetings they attended ever discussed or mentioned this to them, this despite the fact that the defendant Pordum's position was consistently opposite to what the architectural firms desired (Appendix A pp. 6a-8a Stievater's statement to F. B. I.). Neither defendant was shown to have exhibited any signs of recently acquired wealth nor to waiver in their consistent position regarding the Lease (Appendix C pp. 16a-20a).

Robert Casey, the County Attorney for Erie County and of opposite political persuasion than the defendants, testified as a Government witness at trial to the provisions of the contract between the architects and Erie County. He also stated (Appendix C. p. 16a) that the defendants had come to him in July of 1970, which was after Walker had claimed he gave the defendants money and before any indication of criminal proceedings, and that the defendants

told him of a ten thousand dollar ($10,000.) bribe offer by Walker to them in Texas to go along with the stadium. This was apparently discounted by the County Attorney at the time because of indications by the defendants that Walker had been drinking heavily when he made the offer to them. The defendants were in Texas on County business as members of the Stadium Committee.

A Federal Grand Jury was convened in January of 1971 to investigate this matter. The defendants were invited by the Federal Bureau of Investigation to come to their offices to make statements, which they voluntarily did (Appendix A p. 1a). They were invited back the next day to testify before the Grand Jury. They said that they would. That day, after giving their statement to the F. B. I., the defendant Ludera retained attorney William B. Mahoney and from that time on both defendants stood mute.

Trial on the attached indictment (Appendix B p. 9a) began on June 7, 1971, and on June 16, the jury returned a verdict of guilty as to the first count (conspiracy) and not guilty to the remaining counts (accepting bribes) as to both defendants. On July 6th a motion for a new trial on the basis of newly discovered evidence was denied and both defendants were sentenced to a term of confinement of three years pursuant to Title 18 U. S. C. § 4208 (a) (2). They have since remained free on their own recognizance.

On November 18, 1971, the appeals of both defendants were denied *per curiam* by the United States Court of Appeals for the Second Circuit, decision attached appendix D. p. 21a. That Court alluded to, without specifying, independent non-hearsay evidence. The only incriminating evidence against the defendants was the words and actions of J. Lloyd Walker. The defendants have consistently maintained their innocence.

The defendant Pordum retained present counsel after his appeal was denied by the Second Circuit. A subsequent petition for rehearing was denied on December 6, 1971, (petition and denial attached appendix E, F & G pp. 25a-33a) and a motion by the defendant Pordum for a polygraph examination by the Government was denied by the trial judge on December 20th, (petition and transcript of oral argument attached appendix H & I pp. 34a-62a).

Reasons for Granting the Writ

THE TRAVEL ACT, 18 U. S. C. § 1952, WAS NOT INTENDED TO COVER THIS TYPE SITUATION.

The conspiracy conviction herein pertained to an alleged violation of the Travel Act, 18 U. S. C. § 1952, (indictment appendix B p. 9a). "Legislative history of the Act is limited, but does reveal that § 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activitjes located in another.", *Rewis v. U. S.*, U. S. Supreme Court No. 5342, Oct. Term, 1970, decided April 5, 1971, 9 Cr. L. 3055, 3056. The activities here did not involve organized crime under either the Government's version, namely, two county legislators soliciting bribes for their vote with regard to construction of a county stadium, or under the defendants' contention, namely, that J. Lloyd Walker solicited money from his associates under the guise of passing it on to the defendants as bribes. In addition, the defendants resided in New York State, Walker claims he was solicited here and the stadium was to be built here.

Petitioner adopts the arguments put forth by co-defendant Ludera on this point.

A Federal Conviction Should Not Stand Based Solely on the Uncorroborated Testimony of an Alleged Accomplice.

This issue has never been passed on directly by this Court. The question is one that often recurs. Numerous petitions requesting this Court to review this issue are presented every year. There are numerous Federal Circuit Court decisions involving the same issue. This case places the question in sharp focus as there is not an iota of evidence anywhere, admissible or inadmissible, that incriminates this defendant except for the words and actions of the alleged accomplice, J. Lloyd Walker. (Appendix C pp. 16a-20a). A resolution here might lessen the expenditure of futile efforts and the raising of unfound hopes by quite so many in the future.

The closest this Court came to passing on this issue was in *Caminetti v. the United States*; 242 U. S. 470, 495 (1917), where the majority stated "it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." This does not directly cover the issue. In this case, *United States vs. Pordum*, there is only one alleged accomplice, whereas in *Caminetti* there was the testimony of two girl "accomplices" and somewhat incriminating testimony by a co-defendant (Diggs). In *Valdez vs. United States*, 244 U. S. 432, 440 (1917), the Court considered the matter but found that the testimony of the accomplice "had substantial corroboration".

In no case has this Court ever upheld a conviction based solely on the uncorroborated testimony of a single accomplice. This Court has considered the issue in some degree on five occasions and upheld the conviction in four of those instances. In each instance where the Court has upheld the conviction, it has pointed out corroborating evidence to substantiate the accomplice's testimony (*Caminetti* and *Valdez supra, Glasser* and *Stein infra*).

The Court stated in *Glasser vs. United States*, 315 U. S. 60, 77 (1941) "We are clear that substantial evidence supports the verdict against both. As noted before, Kretske does not raise the point other than to mention that the testimony against him was largely that of accomplices and unsavory characters." The issue was tangentially considered in *Stein vs. New York*, 346 U. S. 156 (1952). There again the Court pointed out other evidence of petitioner's guilt, such as direct testimony of the surviving victim and of a well corroborated accomplice, as well as some unexplained incriminatory circumstances.

The issue was also considered somewhat, for the fifth and last time, in *Cash vs. Culver*, 358 U. S. 633 (1959), wherein the Court noted that Florida law did not require corroboration of an accomplice's testimony in order to sustain a conviction. However, that State conviction was reversed on other grounds, namely, lack of assistance of an attorney at trial.

Within the last year several state courts have reiterated their position as not allowing these type convictions to stand, for example: *Powell vs. State*, 123 Ga. App. 795, 182 S.E.2d 677 (1971), *Strong vs. State*, 261 Md. 371, 275 A. 2d 491 (1971), *Lamb vs. Bennett*, 482 P.2d 298 (Nev. 1971), *State vs. Banks*, 486 P.2d 584 (Ore. 1971), and *People vs. Davis*, 322 N.Y.S.2d 116 (Dutchess Co. Ct. 1971).

One reason given in opposition to the so-called "Federal Rule"; in addition to general unreliability of such type people, is that "a confessed confessed criminal might be attempting to gain the conviction of an innocent man through perjured testimony in exchange for his own immunity". *State vs. Coffey*, 157 Ore. 457, 463, 72 P.2d 35 (1937). A great potential for coercion is also present.

In this case, Pordum, the Trial Judge charged the jury that "the testimony of an accomplice or co-conspirator alone, if believed by you, may be of sufficient weight, to sustain a verdict of guilty, even though not corroborated or supported by other evidence." (p. 593 Appendix to United States Court of Appeals for Second Circuit). The testimony of the entire trial was transcribed, printed and sent as part of the record on appeal to the Second Circuit.

Another factor contributing to the many petitions to this Court in regard to this issue, in addition to the fact that this Court has never directly passed on the issue, is the fact that several older Federal cases spell out positions opposite to what is considered to be the present rule. For example, in *United States vs. Kessler*, Fed. Cas. No. 15,528 (1829) the Court said "it is usual for the court to advise the jury not to regard the evidence of an accomplice unless he is confirmed in some part of his evidence by unimpeachable testimony." In *United States vs. Harries*, Fed. Cas. No. 15,309 (1869), an instruction was given that in felony cases "a jury ought, in no case, to convict on the uncorroborated testimony of an accomplice." Similarly in *United States vs. Blaisdell*, Fed. Cas. No. 14,608 (1869) it was stated "A jury is always told that it is never safe to convict upon the uncorroborated testimony of a single accomplice." In *United States vs. Ybanez*, 53 Fed. 536, 540 (Cir. Ct. W. D. Texas 1892) the Court instructed the jury "not to regard

the evidence of an accomplice unless he is confirmed and corroborated in some material parts of his evidence connecting the defendant with the crime, by unimpeachable testimony."

Fairly recently a Federal Circuit Court stated "a skeptical approach to accomplice testimony is a mark of the fair administration of justice. From Crown political prosecutions, and before, to recent prison camp inquisitions, a long history of human frailty and government over-reaching for convictions justifies mistrust in accomplice testimony.", *Phelps vs. United States*, 252 F.2nd 49, 52 (5th Cir. 1958).

THIS WAS ESSENTIALLY AN ALLEDGED STATE CRIME AND SHOULD NOT HAVE BEEN TRIED IN FEDERAL COURT UNDER FEDERAL RULES.

What was alleged here was bribery of local officials, namely county legislatures, concerning the construction of a stadium by Erie County (See Indictment Appendix B p. 9a). This project did not involve Federal funds. Federal jurisdiction attached only because of trips made between Houston, Texas and Buffalo, New York.

Since this was essentially a state crime it should have been tried in State Court, or if in Federal Court, then under State rules of substantive law, *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1937). This conviction, based solely on the uncorroborated testimony of an alleged co-conspirator, could not stand under the laws of this state, N. Y. Code of Crim. Proc. § 399 (now covered by N. Y. Crim. Proc. Law § 60.22, Eff. Sept. 1, 1971); *People v. Mulkens*, 292 N. Y. 408, 55 N. E. 2d 479 (1944); *People v. Davis*, 322 N. Y. S. 2d 116 (Dutchess Co. Ct.—1971).

There are only three Federal judges for the seventeen counties comprising the Western District of New York, an area containing over three million people. There are over seventy local judges in this area authorized to try matters of this nature. Certain cases are uniquely Federal in nature and are required to be tried in Federal Court, for example, tax matters, draft evasion, smuggling, suits involving the United States Government, etc., Prosecutors should not be permitted to turn local situations into Federal matters, to the great disadvantage of defendants, without some showing of necessity. Here there was apparently none. The local District Attorney had a grand jury investigation in progress covering the same situation. In fact, he has indicted some of the people that testified for the Government under grants of immunity (authorized by Will Wilson, Assistant Attorney General), for example, Ralph A. Anderson Jr., of the firm of Wilson, Morris, Crane & Anderson of Houston, Texas and Robert H. Stievater of the Buffalo firm.

The defendant Pordum was severly injured in two respects by this matter being tried in Federal Court. First, the case could not have even gone to a jury under New York State Law because a conviction can not stand in this State based solely on the unorroborated testimony of a co-conspirator. Second, assuming *arguendo*, there had been a conviction for conspiracy, as here, it would have only been a misdemeanor (N. Y. Penal Law § 105.05) and not a felony (T. 18 U. S. C. § 371).

THE TRIAL JUDGE SERIOUSLY PREJUDICED THE DEFENDANT'S CASE WHEN HE PERMITTED THE JURY TO DECIDE WITHOUT BEING INFORMED OF THE RULES OF THE ERIE COUNTY LEGISLATURE, AS THE JURY REQUESTED.

The petitioner adopts the arguments of co-defendant Ludera on this point.

Conclusion

For the reasons set forth above, it is respectfully requested that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

EDGAR C. NEMOYER,
Counsel for Petitioner,
Frederick Pordum,
736 Brisbane Bldg.,
Buffalo, New York 14203.



Appendix "A".

F. B. I. STATEMENTS.

File # Buffalo 92-1522
Date dictated 1/26/71

On 1/25/71 at Buffalo, New York
by SAs GRAHAM J. DESVERNINE and
DONALD E. HARTNETT/DEH:saw

Date 1/26/71

Frederick Pordum, 161 East Milnor Street, Lackawanna, New York, telephone 826-2251, appeared at the Buffalo Office of the Federal Bureau of Investigation, accompanied by his attorney, Joseph Biondolillo. A standard form statement, captioned "Voluntary Appearance; Advice of Rights—Your Rights," was read to Mr. Pordum at 2:35 P. M. in the presence of his attorney and he stated that he understood the contents of this form and signed the form at 2:35 P. M.

Mr. Pordum stated that he is the Democratic minority whip of the Erie County Legislature and a substitute schoolteacher. Mr. Pordum advised that some time during July, 1970, he and Frank Ludera, a member of the Erie County Legislature, accompanied Lloyd Walker to Houston, Texas. He stated that Mr. Walker is a member of the architectural firm of Turley, Stievater, Walker, Mauri and Associates, which firm had drawn up the schematic plans for the planned Dome Stadium at Lancaster, New York. He stated the purpose of this trip was to meet with various individuals who had been involved in the planning and construction of the Astrodome at Houston, Texas, as well as visually inspecting the Astrodome itself.

F. B. I. Statements.

He advised that prior to leaving Buffalo, Mr. Walker had furnished both he and Mr. Ludera round-trip plane tickets for the Houston visit. He continued that to the best of his recollection they left Buffalo on a Tuesday and returned Friday of the same week. He stated that all three of them stayed at the Astro World Hotel, which is adjacent to the Astrodome site and that he and Mr. Walker had rooms which bordered on a common suite, while Mr. Ludera had a room further down the hall on the same floor. He advised that some time during the period of their stay there, he and Mr. Ludera had a conversation with Mr. Walker, during which Walker told them that Mr. Edward Cottrell, who was the individual involved in building the planned Dome Stadium in Lancaster, New York, had told Walker that he was presently trying to make arrangements to transfer to the Buffalo area a small stadium, which had been used as a temporary measure for the Houston Astro National Baseball Team prior to the completion of the Astrodome. He said that Mr. Cottrell indicated that in trying to have this stadium moved to the Buffalo area, he could situate it near the Lancaster site of the Domed Stadium and that it would be instrumental in immediately obtaining a major league baseball franchise pending completion of the planned Dome Stadium.

Pordum stated that Walker told them that this would be one of the ways in which a sum of $10,000 could be funnelled to Ludera and himself in exchange for their voting favorably regarding any future transactions between the Erie Legislature and Dome Stadium, Inc. At that time, Walker also mentioned that should the Dome Stadium be built that there would be additional peripheral deals available from which they could benefit. He said

F. B. I. Statements.

at the time of this conversation Mr. Walker had been drinking and that neither he nor Mr. Ludera took this offer seriously, although he did recall telling Walker that "Cottrell is bad business," and that Walker could get in trouble in becoming involved with him. Pordum stated that this was the only occasion during this trip that any conversation took place concerning an attempt to influence his future voting and denied that any money was given to him at that time. He also stated that both he and Mr. Ludera paid for their own hotel rooms and expenses during this trip, which were subsequently reimbursed by the County of Erie. He said that insofar as entertainment expenses were concerned that Walker, Ludera and he went out during the evenings and generally split the expenses incurred. In response to what types of entertainment he referred to, Mr Pordum stated that they would go out for a few drinks and meals, and were accompanied by women, on several occasions, who were acquaintances of Mr. Ludera, who Ludera had met on previous visits to the Houston area.

Mr. Pordum said that upon their return to Buffalo, both he and Mr. Ludera visited Mr. Robert Casey, Attorney for the County of Erie, possibly the Monday after their return, since they were concerned about the ethics of accepting these paid up tickets from Mr. Walker. He said at that time Mr. Casey advised them to write out their personal checks to Mr. Walker, reimbursing him for the cost of these tickets, which Mr. Pordum said he subsequently did, although he could not recall when this payment had been made, but he felt that his checking account records would substantiate this.

F. B. I: Statements.

He said that during this conversation with Mr. Casey, he and Ludera mentioned Mr, Walker's offer of $10,000 but told Casey that in view of the fact he had been drinking they did not place too much substance in the offer itself. He said he could not recall any significant remark from Casey upon bringing this to his attention and that the matter was not further discussed at that time nor did Mr. Casey advise him to take any further action such as going to the Erie County District Attorney's Office.

Mr. Pordum said that his next significant meeting with Mr. Walker occurred some time around the latter part of August, 1970 or possibly September, 1970, at which time Mr. Walker called him at home and made arrangements to come and see him at his residence the same day. Upon Walker's arrival, they had a discussion relative to the planned Dome Stadium at Lancaster, New York. Mr. Walker indicated at that time that he was very interested in having this stadium built and wanted to know what it would take for Mr. Pordum to change his vote concerning the lease arrangements between the County of Erie and Dome Stadium, Inc. Mr. Pordum recalled at that time that he mentioned something to the effect that it would take a million dollars yearly for forty years, which sum would be written into a lease arrangement between the two parties.

He stated that there was no one else present during this conversation and that he had no recollection of Mr. Walker being under the influence of alcohol. Mr. Pordum advised that he took no action on this incident and never mentioned it to Mr. Casey, the County Attorney.

F. B. I. Statements.

He continued that to the best of his recollection, his next private meeting with Mr. Walker took place at the Hibachi Room of the Touraine Hotel, Delaware Avenue, Buffalo, New York. He said at that time he had made arrangements to meet Mr. Ludera there during the evening for a few drinks as they had done in the past. He placed this incident around November, 1970.

He recalled receiving a telephone call from Mr. Ludera asking whether he was coming to the Hibachi Room and Ludera mentioned that Walker was also there at the time. Pordum said upon arriving at the Hibachi Room, Mr. Walker came over to him and appeared to be inebriated. He said Walker motioned him aside and at that time discussed the possibility of his changing his vote on the Dome Stadium lease. He said that Ed Cottrell would come up with $100,000 for he and Ludera for a change in their voting to a pro-Dome position and that he replied to Walker that neither Walker nor Cottrell could buy the legislators for a million dollars.

He said he finally convinced Mr. Walker to leave the Hibachi Room with him and they subsequently went to the Stage Pigalle across the street on Delaware Avenue, where Walker wanted to have another drink, which he subsequently spilled. He eventually convinced Walker to have some breakfast with him at a nearby Your Host Restaurant. Pordum said he paid for Walker's meal at the time.

Pordum advised that after this meeting, he mentioned this offer to Robert Casey, the Erie County Attorney and mentioned about Walker's condition at the time of the proposal. He said Casey made no recommendation to him as to how to handle the matter nor did he suggest he go

to the Erie County District Attorney about it. Pordum advised that his last meeting with Walker took place some time during December, 1970 outside the chambers of the Erie County Legislator, but he could not recall the substance of this conversation nor has he any recollection of any additional offers being made to him by Mr. Walker in an attempt to influence his voting on the Dome Stadium proposition.

Mr. Pordum further advised that no one else has ever tried to make any proposals to him which might influence his voting in the Erie County Legislator.

File #: Buffalo 92-1522
Date dictated 12/16/70

On 12/10/70 at Buffalo, New York
by SA THOMAS M. SHAUGHNESSY:sal

Date 12/22/70

Robert M. Stievater furnished the following information:

He resides at 8347 Sisson Highway, Eden, New York, telephone number 992-9312.

He is a partner in the architect firm of Turley, Stievater, Walker, Mauri and Associates, 807 Elmwood Ave., Buffalo, New York, telephone number 886-6500.

In the early part of January 1970, J. Lloyd Walker, one of his partners, told Stievater that Frank C. Ludera and Frederick F. Pordum, both Democratic members of the Erie County, New York Legislature, had solicited bribes from Walker for their affirmative votes for the proposed Buffalo Domed Stadium.

F. B. I. Statements.

Stievater's firm had a contract with the Erie County, New York Legislature to draw the plans for the proposed Buffalo Dome. The firm was to be paid approximately $2,300,000. The payments were appropriated monthly by the Erie County Legislature in amounts of approximately $250,000 a month. The firm would receive the $2,300,000 whether the Dome was built or not. However, in the event that the Dome was actually completed, the firm would receive some other money upon its completion.

When Walker told Stievater about the bribes, Stievater expressed shock. Stievater felt that to go to any law enforcement agency at that time would cause adverse publicity for the proposed Dome and might actually kill the Dome Project. Stievater reluctantly agreed that the firm would pay an unspecified amount of bribe money to these individuals. Stievater made it very clear to Walker that the money would be the members' personal money and not the firm's money. Stievater indicated that he personally was in the fifty per cent tax bracket so that any money he paid was costing him fifty per cent more because he had already shown as his tax records that it was his personal money.

Walker telephonically contacted Ralph A. Anderson, Jr., in Houston, Texas in the early part of January 1970. Anderson is a member of the Houston architect firm of Wilson, Morris, Crain and Anderson. This firm was one of two firms that drew the plans for the Houston Astrodome. The other firm was Lloyd, Morgan and Jones. Anderson was advised by Walker of the requested bribes by the legislators and Anderson reluctantly agreed to discuss the bribe offers with the two Houston architect firms.

F. B. I. Statements.

Subsequently, Anderson telephonically advised Walker that the Houston firms would go along with the bribes to any reasonable extent.

Walker and Stievater discussed the bribe offers with the senior partner of their firm, Russell M. Turley. Turley was against paying the bribes but again reluctantly agreed to do so.

All the money paid to Pordum and Ludera was handled by Walker. Walker was given cash on numerous occasions. The portion of the Buffalo firm's bribe money was handled in the following manner:

Stievater and Walker would make out checks on capital accounts of the individual members of the firm. The checks would be made out to Walker. Walker would then cash the checks and pay the cash to Pordum and Ludera.

Stievater never had any contact with Pordum or Ludera pertaining to the bribes. Stievater never was with Walker when Walker made the payments.

Stievater estimated that Walker made a total of approximately eight payments to Pordum and Ludera. The payments averaged approximately $4,000, making the total payments of approximately $32,000.

Appendix "B".

INDICTMENT.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs.

FREDERICK PORDUM, FRANK C. LUDERA.

March 1970 Session, No. CR-1971 11

Vio. Title 18, U. S. C., Sections 2, 371 and 1952.

COUNT I

The Grand Jury charges:

That, from on or about December 15, 1969 and continuing to on or about December 31, 1970, the exact dates being to the Grand Jury unknown, in the Western District of New York, and elsewhere, Frederick Pordum and Frank C. Ludera, the defendants herein, and J. Lloyd Walker, named herein as a co-conspirator but not as a defendant, did knowingly, willfully and unlawfully combine, conspire, confederate and agree with each other and with diverse other persons, whose names are to the Grand Jury unknown, to commit offenses against the United States of

America in violation of the provisions of Section 1952, Title 18, United States Code, in that the defendants and said co-conspirators would travel and willfully cause others to travel in interstate commerce and they would use and willfully cause others to use facilities in interstate commerce, including telephones with the intent to promote, manage, establish and carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, said unlawful activity being bribery in violation of the laws of New York, specifically Section 200.10 of the Penal Laws of the State of New York (McKinney's Consolidated Laws of New York, Book 39, Penal Law).

(1) It was a part of said conspiracy that the defendants Frederick Pordum and Frank C. Ludera, as members of the Erie County Legislature, would repeatedly meet with J. Lloyd Walker to discuss payments of money to them.

(2) It was further a part of said conspiracy that Frederick Pordum and Frank C. Ludera would solicit a cash payment of $100,000 from co-conspirator but not defendant J. Lloyd Walker.

(3) It was further a part of said conspiracy that Frederick Pordum and Frank C. Ludera, as members of the Erie County Legislature and acting in their official capacities, would block the allocation of funds for the planning and building of a proposed domed stadium in Erie County, New York, unless payments were received from J. Lloyd Walker and others to the Grand Jury unknown.

(4) It was further a part of said conspiracy that Frederick Pordum, Frank C. Ludera and J. Lloyd Walker would agree among themselves to travel and cause travel in

interstate commerce, and to use and cause the use of interstate facilities, including telephones, for the purpose of transmitting $2,000 in cash from Houston, Texas to Buffalo, New York.

(5) It was further a part of said conspiracy that Frederick Pordum, Frank C. Ludera and J. Lloyd Walker would agree among themselves to travel to Houston, Texas to receive a cash payment of $5,000 in Houston, Texas.

All in violation of Section 371, Title 18, United States Code.

OVERT ACTS

(1) On or about December 28, 1969, the defendants Frederick Pordum and Frank C. Ludera met with J. Lloyd Walker at the Beef and Baron Restaurant, Statler Hotel, Buffalo, New York.

(2) On or about January 14, 1970, the defendants Frederick Pordum and Frank C. Ludera caused Ralph A. Anderson, Jr. to travel from Houston, Texas to Buffalo, New York to deliver $2,500 cash to J. Lloyd Walker.

(3) On or about January 14, 1970, the defendants Frederick Pordum and Frank C. Ludera received $2,500 in cash from J. Lloyd Walker in Buffalo, New York.

(4) On or about January 22, 1970, J. Lloyd Walker conveyed $2,000 in cash to the defendants Frederick Pordum and Frank C. Ludera at the Royal Pheasant Restaurant, Buffalo, New York.

(5) On or about February 9, 1970, J. Lloyd Walker obtained $2,500 in cash and conveyed the same $2,500 to the defendants Frederick Pordum and Frank C. Ludera in Buffalo, New York.

(6) On or about February 11, 1970, the defendants Frederick Pordum and Frank C. Ludera received $2,000 in cash from J. Lloyd Walker in Buffalo, New York.

(7) On or about March 27, 1970, the defendants Frederick Pordum and Frank C. Ludera received $2,000 in cash from J. Lloyd Walker in Buffalo, New York.

(8) On or about April 3, 1970, the defendants Frederick Pordum and Frank C. Ludera received $5,000 in cash at the Astro-World Hotel in Houston, Texas.

(9) On or about May 6, 1970, the defendants Frederick Pordum and Frank C. Ludera received $10,000 in cash from J. Lloyd Walker in Buffalo, New York.

COUNT II

The Grand Jury further charges:

That on or about the 14th day of January, 1970, in the Western District of New York and elsewhere, the defendants herein, Frederick Pordum and Frank C. Ludera, did willfully cause Ralph A. Anderson, Jr. to travel in interstate commerce between Houston, Texas and Buffalo, New York in the Western District of New York, and the defendants did cause said travel with intent to promote, manage, establish, and carry on and facilitate the promoting, management, establishing, and carrying on of an unlawful activity, said unlawful activity being bribery of officials of the Erie County, New York Legislature, to obtain a favorable vote, opinion, judgment, action and decision to promote the building of the proposed domed stadium in Erie County, New York in the Western District of New York, in violation of the laws of New York, specifically Section 200.10 of the

Penal Laws of the State of New York (McKinney's Consolidated Laws of New York, Annotated) in that the said defendants caused the said Ralph A. Anderson, Jr. to travel in interstate commerce as aforesaid to deliver a sum of money, to wit, $2500.00 in United States currency and further that said defendants did thereafter perform and attempt to perform the acts of promoting, managing, establishing, and carrying on of said unlawful activity.

All of the above in violation of Sections 2 and 1952 of Title 18, United States Code.

COUNT III

The Grand Jury further charges:

That Frederick Pordum and Frank C. Ludera, the defendants herein, did, on or about February 9, 1970, willfully cause an agent of J. Lloyd Walker to travel in interstate commerce between Houston, Texas and Buffalo, New York, in the Western District of New York, and the defendants did cause said travel with the intent to promote, manage, establish, and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being bribery of officials of the Erie County, New York Legislature, to obtain a favorable vote, opinion, judgment, action and decision to promote the building of the proposed domed stadium in Erie County, New York, in the Western District of New York, in violation of the laws of New York, specifically, Section 200.10 of the Penal Laws of the State of New York (McKinney's Consolidated Laws of New York Annotated), in that the said defendants caused the agent of J. Lloyd Walker to travel in interstate commerce as aforesaid to

deliver a sum of money, to wit, $2,000.00 in United States currency which was conveyed to the defendants on or about February 9, 1970 in Buffalo, New York, and further that said defendants did thereafter perform and attempt to perform the acts of promoting, managing, establishing, and carrying on and facilitating the promoting, managing, establishing, and carrying on of said unlawful activity.

All of the above in violation of Sections 2 and 1952 of Title 18, United States Code.

COUNT IV

The Grand Jury further charges:

That on or about the 3rd day of April, 1970, in Houston, Texas and elsewhere, the defendants herein, Frederick Pordum and Frank C. Ludera, did willfully cause J. Lloyd Walker to travel in interstate commerce between Buffalo, New York, in the Western District of New York, and Houston, Texas, and the defendants did cause said travel with intent to promote, manage, establish, and carry on and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being bribery of officials of the Erie County, New York Legislature to obtain a favorable vote, opinion, judgment, action and decision to promote the building of the proposed domed stadium in Erie County, New York, in the Western District of New York, in violation of the laws of New York, specifically Section 200.10 of the Penal Laws of the State of New York (McKinney's Consolidated Laws of New York Annotated) in that the defendants caused the said J. Lloyd Walker to travel in interstate commerce as aforesaid to deliver a sum of money, to wit, $5,000.00 in United

States currency which was conveyed to the defendants in Houston, Texas on or about April 3, 1970, and further that said defendants did thereafter perform and attempt to perform the acts of promoting, managing, establishing and carrying on and facilitating the promoting, managing, establishing, and carrying on of said unlawful activity.

All of the above in violation of Sections 2 and 1952 of Title 18, United States Code.

H. KENNETH SCHROEDER, JR.,
United States Attorney,

By: .....,

KURT W. MUELLENBERG,
Special Attorney,
Department of Justice.

A TRUE BILL:
JOSEPH J. RUH,
Foreman.

Appendix "C".

TRANSCRIPT OF SELECTED TRIAL TESTIMONY.

By Mr. Richards:

Q. All right. Now, Mr. Casey, are you acquainted with the defendants, Mr. Pordum and Mr. Ludera? A. Yes, I am.

Q. Mr. Casey, in your position as County Attorney, did there come a time when Mr. Pordum and Mr. Ludera came to you to talk about Lloyd Walker and any alleged bribes? A. Well, there was a time that Mr. Ludera and Mr. Pordum came to me with two plane tickets stubs that had been used.

Q. Approximately when was this; can you fix an approximate date? A. I would say about the middle of July of 1970.

Q. Is this the time that they came to you or were the plane stubs for the middle of July? A. This would be the time they came to see me.

Q. Continue. A. And these plane tickets were obviously paid for by I think either Mr. Walker or Mr. Walker's firm with a charge account, and they asked me first whether it would be proper for them to have accepted these plane tickets for this trip to Houston, which they told me was for the purpose of discussing the Astrodome with the Hofheinz interests down there, and to discuss the relationship between the Astrodome and the County of Harris.

Q. This would be Harris County, Texas? A. Yes, and it was either at that time or around that time that they told me that Lloyd Walker had a quart of scotch for breakfast and drank for the rest of the day, and offered them $10,000 to go along with the domed stadium.

Q. And did any further conversation ensue from this incident? A. Well, it was just a question of was this a

legitimate bribe attempt, was this a competent bribe attempt, or was this the product of a man that was drinking and didn't know what he was doing.

* * *

Mr. Mahoney: Yes, your Honor. Relative to Mr. Ludera, and as to the factual background, you are fully conversant with what took place before you in the trial of this particular matter, so I don't think there is any necessity whatsoever of reviewing the factual background, with but one exception, and that is, your Honor, that the defendant Ludera consistently has stated, and still does, up to and including the present moment, that the testimony of J. Lloyd Walker was not only a fabrication, a falsity, but downright perjury that occurred in this particular court on the part of Mr. Walker, who was the only witness that involved Mr. Ludera in any respect whatsoever. You are well aware of the fact that Messrs. Anderson, Stievater and Mueller had never had any contact, had never had any conversation, with the defendant Ludera, and that they were totally ignorant as to what became of the money supposedly passed by all three of them to J. Lloyd Walker, who I say is not only a perjurer, but a fabricator and a liar. Relative to Mr. Ludera, himself, your Honor, I fully appreciate that an exhaustive probation report has been compiled by the Probation Department of the United States, but I think there is something very significant in there that I would like to submit to yourself, and that is this. There has been testimony before you relative to a number of payments of money made by those gentle-

men that I have referred to somewhat qualifiedly as gentlemen, Anderson, Mueller and Stievater, but payments made by them to Walker, and the alleged payments made by him to the defendant sometime during the year of 1970. We judge a man by the manner in which he has acquired recent wealth or wealth from avenues that are frowned upon by society in general. But I have had an opportunity to look over income tax returns for the year of—I am quite sure—1967, '68, '69, and have been apprised of the year of '70, and from an examination of the income tax records, with a man being ever faithful to the United States Government, as well as the New York State Government, as to his obligation to pay, that it shows that his source of revenue was entirely from the County of Erie, and the salary that he received as a legislator, also the income that he received from Western Electric, the employer of Mr. Ludera. There isn't any evidence—I am quite sure that if the Government had a scintilla of it in its portfolio that they would have produced it in this trial—to show recent wealth from undisclosed sources. You are certainly appreciative of the fact that he is a family man with wife, with children, etcetera, and I am quite sure that you are in a much better position than myself to make a determination as to what should be the penalization in this particular case.

The Court: I now address you personally, Mr. Ludera. I ask you if you wish to make any statement in your own behalf and to present any information in mitigation of punishment?

Mr. Ludera: I do not wish to make any statement.

The Court: Mr. Biondolillo, would you like to speak on behalf of the defendant Frederick Pordum?

Mr. Biondolillo: Yes. You have before you a probation report of Mr. Pordum. In that report it shows that Mr. Pordum, up until the 16th of June 1971, had not only a good record but an exemplary record, as evidenced in his educational background, how he excelled in school, as a legislator, as a teacher and coach. Today he stands before you and in a few minutes will be stripped of his office as a County Legislator, he will be denied any right to teach in any public school, he will be denied the right to vote in an election. Your Honor, this, in and of itself, is perhaps the greatest punishment Fred Pordum could receive in this case. You also have this financial picture before you, he has one child who is a victim of mental disability in St. Rita's Home and dependent upon his support. He is expecting another child in September. If he were removed and incarcerated his family would be placed on welfare. Again, your Honor, to reiterate what Mr. Mahoney said, there is nothing in the trial, with the exception of the testimony of Walker, that shows that Mr. Pordum conducted himself in any other manner other than as a legislator dedicated to the betterment of the County of Erie, and there is testimony from the other legislators to this effect. An appeal is a costly thing, your Honor. If this man is incarcerated, he could not get the type of job that he would need, by giving his employers an assurance if all appeals fail he will still be able to be on the job. There are many ques-

tions in my mind as to this trial. I, personally, am convinced that Mr. Pordum is innocent. For those reasons we respectfully request leniency.

The Court: I now address you personally, Mr. Pordum; and I ask you if you wish to make any statement in your own behalf and to present any information in mitigation of punishment?

Mr. Pordum: Your Honor, I actually don't have anything to say except that I am being brought before this Court and I know nothing of what transpired.

* * *

Appendix "D"

OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 282-283—September Term, 1971.

(Argued November 10, 1971 Decided November 18, 1971.)

Docket Nos. 71-1894—71-1895

UNITED STATES OF AMERICA,

Appellee,

v.

FREDERICK PORDUM, FRANK C. LUDERA,

Appellants.

Before: Kaufman and Mansfield, Circuit Judges and Levet, District Judge.*

Appeal from a conviction for a bribery conspiracy in violation of 18 U. S. C. §§ 2,371 and 1952 after a jury trial before Judge Henderson in the District Court for the Western District of New York.

Affirmed:

William B. Mahoney, Esq., Buffalo, New York, for Appellants.

---

* United States District Judge for the Southern District of New York, sitting by designation.

James R. Richards, Assistant United States Attorney (H. Kenneth Schroeder, Jr., United States Attorney for the Western District of New York), for Appellee.

PER CURIAM:

This is an appeal from a judgment of the United States District Court for the Western District of New York (Henderson, J.) entered on June 16, 1971 after a jury trial convicting both defendants on one count, a bribery conspiracy. We affirm.

The appellants, Frederick Pordum and Frank C. Ludera, were accused in a four-count indictment of violating Sections 2, 371 and 1952, Title 18, United States Code. The first count, the only one on which appellants were convicted, charged that appellants, along with an unindicted co-conspirator, one J. Lloyd Walker, conspired to use and cause others to use the facilities of interstate commerce and to promote, carry on and facilitate an unlawful activity of bribery in violation of Section 200.10 of the Penal Law of the State of New York; and of violating Section 371, Title 18, United States Code, alleging that they conspired, as members of the Erie County Legislature, to solicit and obtain bribes in return for the exercise of their official powers; all in violation of Sections 2, 371 and 1952, Title 18, United States Code. There is little dispute as to the facts.

The appellants argue, however, that (1) the court misconstrued the principle in *United States v. Geaney*, 417 F. 2d 1116 (1969), *cert. den.* 397 U.S. 1028 (1970); (2) the court incorrectly admitted, subject to connection, the hearsay testimony of three persons, Messrs. Anderson, Stie-

vater and Mueller, with respect to statements by Walker, a co-conspirator, but not a defendant; and (3) the court erred in denying the motion for a new trial based on newly discovered evidence. We find no merit in these arguments.

First, we find that the trial judge properly applied the conspiracy test enunciated in the *Geaney* case. In *Geaney* Judge Friendly articulated the guidelines that in a conspiracy trial, if hearsay be admitted subject to connection, the trial judge "must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances." If he has, then the utterances go to the jury for it to consider along with all the other evidence. In addition, the trial judge's finding of the existence of a conspiracy must be supported on reasonable grounds. *United States v. Geaney, supra* at 1120.

Judge Henderson correctly applied the *Geaney* test. After reviewing the testimony submitted by the prosecution, Judge Henderson found that a conspiracy existed and that a fair preponderance of the evidence, independent of hearsay utterances, established the participation of the two defendants in that conspiracy. He submitted his findings along with the other evidence to the jury (Tr. Rec. 374-375).

The contentions by the defendants that there was no independent non-hearsay evidence and that the court made premature instructions to the jury conveying the impression that a conspiracy had already been established are not valid. Independent non-hearsay testimony was pro-

dicted on the first count and the comments made by the trial judge after Walker's testimony were not premature instructions but merely an explanation to the jury as to the circumstances under which the testimony was being tentatively received.

Second, the court properly admitted, subject to connection, the testimony of Messrs. Anderson, Stievater and Mueller. After meeting the test in *Geaney* that there was sufficient independent non-hearsay evidence to prove participation in the conspiracy, the hearsay declarations of a co-conspirator are admissible insofar as they are made in furtherance of the conspiracy. *United States v. Renda*, 56 F. 2d 601 (2d Cir. 1932). The finding that a defendant was a co-conspirator can be based solely on the non-hearsay assertions of another co-conspirator. See *United States v. Jacobs*, 431 F. 2d 754, 759-761 (2d Cir. 1970), *cert. den.* 402 U. S. 950 (1971); *United States v. Calarco*, 424 F. 2d 637, 660 (2d Cir. 1970), *cert. den.* 400 U. S. 823 (1970); *United States v. Corallo*, 413 F. 2d 1306, 1323 (2d Cir. 1969), *cert. den.* 396 U. S. 1038 (1970).

Third, the court's denial of the motion for a new trial was proper. Although the appellants allege that there was newly discovered evidence which would have induced them to call a certain witness (one Cottrell) to the stand, this evidence was no more than extension of what they already knew. The appellants had known of statements and testimony made prior to and during trial by this witness but on account of their trial strategy elected not to call the witness to testify. To permit the appellants to change their strategy after an adverse verdict would be improper.

Affirmed.

Appendix "E".

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 282—September Term, 1971

(Argued November 10, 1971 Denied November 18, 1971)

Docket No. 71-1894

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

FREDERICK PORDUM,

Defendant-Petitioner.

PETITION FOR REHEARING

EDGAR C. NEMOYER,
Attorney for Defendant-Petitioner,
736 Brisbane Building,
Buffalo, New York 14203.

Petition for Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

FREDERICK PORDUM,
Defendant-Petitioner.

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Frederick Pordum, the defendant-petitioner above-named, presents this, his petition for a rehearing in the above entitled matter, and, in support thereof, respectfully shows:

I.

That he was convicted on June 16, 1971, of conspiring with one J. Lloyd Walker to use interstate facilities for bribery of himself. This conviction was affirmed *per curiam* by this Court on November 18, 1971.

II.

After affirmance of this conviction your petitioner sought new counsel and professed his innocence to him, as he has maintained all along. New counsel, Edgar McMoyer, directed petitioner forthwith to submit to a lie detector examination by one John Rapp, who is considered by most knowledgeable

people in this area to be the best polygraph operator available. The report of that examination is attached and marked exhibit "A". If this rehearing is granted, there will be attached to our rehearing brief a report from every polygraph operator in this area and any additional operators that the Government wishes to use. Your petitioner will gladly submit to any such examination.

At the onset of this matter, your petitioner had made a statement to the FBI and had informed them that he was willing to testify before a Grand Jury. When petitioner's former counsel was retained, he advised petitioner not to appear before the Grand Jury and informed him that he would have an opportunity to testify at trial. Your petitioner planned and desired to testify at trial, but when the appropriate time came, over his objection, his former counsel did not call him to the stand. See Point VI for amplification.

III.

The testimony of the entire trial was transcribed, printed and furnished on appeal to this Court. There was not presented at trial, nor is there anywhere available, a scintilla of incriminating evidence against your petitioner other than the actions and testimony of J. Lloyd Walker, who had a personal motive to want others to believe that he was distributing money that was being given to him.

IV.

Your petitioner will seek to argue on rehearing, if the Court will agree to hear him, that the Federal Rule permitting the conviction on the uncorroborated testimony of

a co-conspirator should be curtailed and further that there was actually no corroboration or incriminating evidence concerning your petitioner, either admissible or inadmissible, other than the words and actions of J. Lloyd Walker, a person who had ample motivation to falsify his testimony.

V.

Your petitioner will further argue that this case properly belonged in the State courts for prosecution. The accusation was promotion of bribery as defined by Section 200.10 of the New York Penal Law and the allegation was bribery of petitioner a state official, namely a county legislator. The basis used for Federal jurisdiction was certain trips made between Texas and New York. This does not alter the fact that this was in essence a State offense. Further evidence of this is the fact that the local District Attorney, Michael F. Dillon of Erie County, has subsequently indicted people in regard to this same matter, some of whom were witnesses for the Government in the trial of this matter.

VI.

Petitioner states that he is willing to undergo additional polygraph examinations by any competent operator and or sodium pentothal (truth serum) examination by a competent M. D. Petitioner is also willing to give statements under oath, or otherwise, to any recognized government (local or Federal) agency. Petitioner has an appointment with Richard O. Arther of 37 West 57th Street, New York, New York, for a polygraph examination on December 6, 1971, the earliest date Mr. Arther could give us. We have been

informed by Mr. Rapp, and a Mr. Merlo, another local polygraph operator, that Mr. Arthur is considered the best in the profession nationally. His report will be made available.

VII.

Petitioner further states that if J. Lloyd Walker, the principal and only incriminating witness against him at trial or anywhere, takes a lie detector test or undergoes a sodium pentothal examination, by a competent operator, and it is alleged by said operator that Walker is telling the truth regarding giving your petitioner money to influence his vote or that your petitioner so requested money for that purposes, the offenses your petitioner was charged with, your petitioner will withdraw his petition for a rehearing and surrender himself forthwith to the United States Marshall to begin service of his sentence.

State of New York,)
County of Erie,) ss.:

I, FREDERICK PORDUM, being duly sworn, state that I have read the foregoing and I swear to the truth of the matters therein stated.

FREDERICK PORDUM.

Before me this day of November, 1971, appeared FREDERICK PORDUM, who is known to me and was duly sworn by me, and he swore to the truth of all factual matters recited above.

EDGAR C. NEMOYER,
Notary Public,
State of New York,
Qualified in Erie County,
My Commission Expires March 30, 1973.

I, EDGAR C. NEMOYER, attorney for Frederick Pordum, the petitioner herein, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for purpose of delay.

EDGAR C. NEMOYER.

The Polygraph Examination annexed to the foregoing Petition for Rehearing is the same as that printed hereinafter at Pages 43a-44a.

Appendix "F".

PETITION FOR REHEARING.

BOREANAZ, O'SHEA & NE MOYER
Attorneys & Counsellors
736 Brisbane Bldg.
Buffalo, New York 14203
(716) 854-5800

December 6, 1071

Honorable Judges
Second Circuit
United States Court of Appeals
United States Court House
Foley Square
New York, New York 10007

Re: United States v. Frederick Pordum
No. 282—September Term, 1971, Docket No. 71-1894

Dear Judges:

On Saturday, December 4th, Frederick Pordum underwent a polygraph examination by Richard O. Arther as set forth in our petition to you submitted on December 1st.

The examination had been scheduled for Monday, December 6th. Mr. Arther was unable to meet that commitment because of a prior date unspecified commitment to examine prospective members of the Michigan State Police. Mr. Arther is examining on behalf of the Michigan State Police Monday thru Thursday of this week.

Mr. Arther verbally informed Mr. Pordum and myself, after his examination on last Saturday, that Mr. Pordum had passed the lie detector examination and was, in his opinion, innocent of all the charges placed against him.

Mr. Arther gave Mr. Pordum a very thorough examination. Mr. Arther said he would be unable to furnish a written report of that examination this week because of the forementioned engagement with the Michigan State Police. He said he would send me a complete report next week. That report will be sent to you as a supplemental exhibit to our petition for a rehearing, as soon as it is available.

Respectfully submitted,

EDGAR C. NEMOYER,

ECN:nl
CC: Hon. John O. Henderson, U. S. District Judge
U. S. Attorney's Office, Western District of New York
F. B. I., Buffalo Office
James Richards, Esq., Department of Justice
Richard O. Arther

Appendix "G".

DECISION OF COURT OF APPEALS DENYING REHEARING.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FREDERICK PORDUM and FRANK C. LUDERA,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant, Frederick Pordum,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

December 6, 1971.

IRVING R. KAUFMAN
WALTER R. MANSFIELD *USCJJ*
RICHARD H. LEVET *USDJ*

Appendix "H".

NOTICE OF MOTION.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

FREDERICK PORDUM,

Defendant.

Indictment No. CR 1971-11.

Sir:

PLEASE TAKE NOTICE, that upon the indictment in the about entitled action, Numbered Criminal 1971-11, dated on or about January 29, 1971, upon the annexed affidavit of Edgar C. NeMoyer, Esq., attorney for the defendant, Frederick Pordum, and upon the annexed affidavit of Frederick Pordum, the defendant herein, and upon all prior papers and proceedings had herein, the undersigned will move this Court, at a Term for Motions to be held on the 20th day of December, 1971, in Part I, at the United States Court House, Buffalo, New York, at 10:00 a. m., or as soon thereafter as counsel can be heard,

Notice of Motion:

for an Order directing the Government, the plaintiff herein, to arrange for a polygraph examination of the defendant, Frederick Pordum, by a competent polygraph operator of the Government's choosing to examine Frederick Pordum in regard to the criminal charges contained in the indictment herein, and for such other, further and different relief as to the Court may seem just.

Dated: December 15, 1971.

EDGAR C. NEMOYER
Attorney for Defendant
Frederick Pordum
736 Brisbane Building
Buffalo, New York 14203

To:
Hon. H. Kenneth Schroeder
United States Attorney
James Richards, Esq.
United States Department of Justice

AFFIDAVIT OF EDGAR C. NEMOYER.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FREDERICK PORDUM,

Defendant.

Indictment No. CR 1971-11.

State of New York,
County of Erie,
City of Buffalo. } ss.:

I, EDGAR C. NEMOYER, being duly sworn, depose and says that:

1. I am an attorney at law duly licensed to practice in all Federal and State Courts in this State.

2. I have been retained by one Frederick Pordum to represent him in regard to his conviction in the above matter.

3. Said Frederick Pordum represents to me that he is innocent of all charges contained in the indictment in this matter.

Affidavit of Edgar C. NeMoyer.

4. Pursuant to my advice, Frederick Pordum submitted to polygraph examination locally by one John Rapp in regard to the charges in this matter.

5. Your deponent has had four (4) years experience as a member of the Buffalo Police Department, two (2) years in the Federal Prosecutor's Office locally and several years experience in private practice locally; and firmly believes the aforementioned John Rapp to be the best polygraph operator available in this area.

6. A report of the above mentioned polygraph examination by John Rapp is attached (Exhibit A) and substantiates Frederick Pordum's representation of innocence.

7. In addition to the forementioned polygraph examination, Frederick Pordum underwent a second such examination administered by one Richard O. Arther, report of said examination is attached (Exhibit B).

8. Said Richard O. Arther was recommended to your deponent by two local polygraph operators, and others, as being the best polygraph operator available. Attached Exhibit B, Pages 4 and 5, list his qualifications.

9. Before the polygraph examination by Mr. Arther, your deponent, paid him, pursuant to his direction, by certified check the fee of $250.00, so that there would be no question regarding motivation.

10. Before the date of the forementioned, your deponent had never met Mr. Arther.

11. Before administering said examination, Mr. Arther reviewed the indictment in this matter and a transcript of the trial testimony.

Affidavit of Edgar C. NeMoyer.

12. Mr. Arther drew the questions set forth in his report, attached Exhibit B.

13. Your deponent believes that the Secret Service, Department of State, Department of Defense, National Security Agency, Federal Bureau of Investigation and Central Intelligence Agency perform polygraph examinations. This was noted in the December 1968, issue of the New York State Bar Journal at Page 570.

14. Your deponent's client, Frederick Pordum, has informed me that he is willing to submit to a polygraph examination by any competent operator, including those employed by or otherwise working for the Government.

WHEREFORE, your deponent joins Mr. Pordum in praying for an Order directing the plaintiff in this matter, to wit, the United States Government to administer to him a polygraph examination in regard to the charges contained in this indictment.

Respectfully submitted,

EDGAR C. NEMOYER

Before me this day appeared Edgar C. NeMoyer, who is known to me, and he did swear to the truth of the above.

12/15/71.

PATRICK J. BAKER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1972.

AFFIDAVIT OF DEFENDANT.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

Plaintiff.

vs.

FREDERICK PORDUM,

Defendant.

Indictment No. CR 1971-11.

State of New York,
County of Erie,
City of Buffalo, } ss.:

I, FREDERICK PORDUM, being duly sworn, depose and state that:

1. I am the defendant above named.

2. On June 16, 1971, a jury found me guilty of Count I and acquitted me of all other counts of the indictment in this matter.

3. I am not guilty of Count I, nor any other count in that indictment or any indictment.

Affidavit of Defendant.

4. I have never conspired or agreed with J. Lloyd Walker, or anyone, to accept money or any personal benefit to vote in any manner with regard to the proposed County Dome Stadium or any legislation.

5. I have never been bribed, nor have I ever agreed to be bribed by anyone with regard to any legislation, proposed or otherwise, including the stadium.

6. I have voluntarily submitted to two polygraph examinations in regard to this matter by what I have been informed are the best operators available locally and nationally. Their reports are attached as Exhibits A & B.

7. I now want the Government to give me a polygraph examination by a competent operator in regard to this indictment.

8. I have been informed that John E. Reid of Chicago, Illinois, is an excellent polygraph operator, that the Metropolitan Police Department of Toronto has very good facilities and that the Government, the plaintiff herein, has competent polygraph operators in its employ.

WHEREFORE, your deponent requests this Court to direct the plaintiff herein, namely the Government to make arrangements to have administered to your deponent a polygraph examination by a competent operator of their choice with regard to the indictment in this matter.

Respectfully yours,

FREDERICK PORDUM

Exhibit "A" Annexed to Foregoing Affidavit of NeMoyer.

Before me this 15th day of December, 1971, appeared Frederick Pordum, to me known and known to me to be the same person named in the above indictment, and he did swear to me that the statements were true to the best of his knowledge.

EDGAR C. NEMOYER
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1973

EXHIBIT "A" ANNEXED TO FOREGOING AFFIDAVIT OF NEMOYER.

Frederick F. Pordum, aged thirty-four, date of birth, December 26, 1936, married and the father of two children, living at 161 East Milnar Street in Lackwanna, New York presented himself with his attorney, Edgar C. NeMayer for the purpose of submitting himself to a polygraph examination.

He is a college graduate and has some graduate courses. The subject is a former county Legislatur and there is presently in the process court appeals relative alleged corruption in the County Legislature, specifically Mr. Pordum has been accused of accepting monies from one Lloyd Walker, the representative of an architectural firm, which was involved in the building of the domed stadium.

There was considerable interrogation prior to the instrumental phase of the examination. Points covered with

considerable soul searching and depth were the possibility of Mr. Pordum's receiving any monies from anyone in order to influence any vote in the Legislature and specifically if he ever received any monies from Lloyd Walker. Mr. Pordum related that while he and Mr. Ludera were in Houston, Texas, Mr. Walker approached them as a pair and offered them $10,000.00 for a vote. Pordum stated that Walker had been drinking when he made the offer. Upon his return to Buffalo, Mr. Pordum went to Mr. Casey, the County Attorney, and told him of the bribe offer. Mr. Casey stated, despite the fact that the offer was made in the presence of both Pordum and Ludera, that because Walker had been drinking, the offer could never be made a successful subject of adjudication. So forget it. Mr. Pordum states that on one other occassion when he met Mr. Walker at the Hibachi Restaurant when Mr. Walker made an offer of $100,000.00 for the votes that would deliver the lease—despite the fact that the bond issue would then have to be decided also.

During the instrumental phase of the polygraph examination, utilizing three phases of the instrument recording blood pressure, pulse rates and electro dermal skin responses, twelve questions were asked and two complete charts were run. The questions and answers are attached hereto.

It is my considered opinion that Mr. Pordum is being completely truthful and honest in answer to all of the questions as proposed. Mr. NeMayer observed the examination, but was in no way in contact with Mr. Pordum other than watching and listening via an amplifier and microphone.

Exhibit "A" Annexed to Foregoing Affidavit of NeMoyer.

A recording was made of the interview, and is in the possession of Mr. NeMayer.

1. Is Frederick F. Pordum your proper name?

A. Yes.

2. Did you ever, in your career, cast a vote in a legislature which had been influenced by money given to you personally?

A. No.

3. Did you ever accept money from Lloyd Walker, specifically to influence your vote on any dome stadium issue?

A. No.

4. Did Lloyd Walker ever give you any money other than that for testimonial and Democratic party dinners?

A. No.

5. Were you a Legislature for the County of Erie for 3½ years?

A. Yes.

6. Have you been in political life approximately six years?

A. Yes.

7. In all of those six years, has anyone ever bought a vote from you by paying you sums of money?

A. No.

Exhibit "A" Annexed to Foregoing Affidavit of NeMoyer.

8. Did you report to the County Attorney at one time, that while in Houston, Texas Lloyd Walker offered both you and Frank Ludera $10,000.00 between you to influence your notes?

A. Yes.

9. Did Lloyd Walker upon another occasion while in the Hibachi Restaurant offer $100,000.00 for approval of the lease?

A. Yes.

10. Did you in your own mind feel that Walker was sincere in this offer and capable of fulfilling it?

A. Yes.

11. Did you ever receive even a token payment of either the $10,000.00 or $100,000.00?

A. No.

12. Is your conscience clear at this time, that you received no money from Mr. Walker or anyone else to influence a vote?

A. Yes.

EXHIBIT "B" ANNEXED TO FOREGOING AFFIDAVIT OF NEMOYER.

SCIENTIFIC LIE DETECTION, INC.
UTILIZING THE ARTHER II & III POLYGRAPHS
Richard O. Arther, B. S. M. A.
President
57 West 57th Street
1109 Medical Arts Center New York, New York 10019
Plaza 5-5241

December 11, 1971

Case No. Y-1893

PRIVILEGED AND CONFIDENTIAL

Edgar C. NeMoyer, Esq.
736 Brisbane Building
Buffalo, N. Y. 14203

Dear Sir:

On December 4, 1971, Frederick Pordum voluntarily came to this polygraph suite for an Arther Polygraph Examination.

The main issue under consideration was whether or not Mr. Produm was telling the truth when he claimed that he had not participated in accepting bribe money from J. Lloyd Walker.

The facts concerning this case were provided the polygraphist by Mr. NeMoyer, who is Mr. Pordum's attorney. Mr. NeMoyer was present in this testing suite during the entire polygraph examination of Mr. Pordum.

Before his pre-test interview, Mr. Pordum signed two copies of a form stating he was taking the tests voluntarily. One copy of this executed form is enclosed with this report; the other is incorporated as part of our case files.

Exhibit "B" Annexed to Foregoing Affidavit of McMoyer.

In the Arther Polygraph recordings, there were definite indications of truthfulness when Mr. Pordum answered "No" to the following listed questions:

1. Did you ever agree with Walker to accept bribe money from him?
2. Did you ever accept bribe money from Walker?
3. In order to justify acceptance of a bribe, did you do anything to further Walker's business?

This report is furnished at your request by your agent, Scientific Lie Detection, Inc., for your exclusive use as merely an opinion concerning the person(s) examined, and absolutely for no other reason or purpose. Disclosure to anyone else is the responsibility of the person receiving this confidential report.

4. Did you ever have in your possession even $1 of Walker's bribe money?

It is the opinion of the polygraphist, based upon Mr. Pordum's Arther Polygraph Examination, that Mr. Pordum is telling the truth to the above listed questions.

Respectfully submitted,

SCIENTIFIC LIE DETECTION, INC.
RICHARD O. ARTHER
Richard O. Arther

ROA:m
Polygraphist
Richard O. Arther

Exhibit "B" Annexed to Foregoing Affidavit of NeMoyer.

Place New York, N. Y. Date December 4, 1971

I, Frederick Pordum, voluntarily—without threats, duress, coercion, force, promises of immunity or reward—agree and stipulate to take a polygraph (truth-verification) examination for the mutual benefit of myself, Scientific Lie Detection, Inc., and Edgar C. NeMoyer, Esq.

I fully realize that: I am not required to take this examination, I may remain silent the entire time I am here, anything I may say can be used against me in any court of law, I may first consult with an attorney or anyone I wish to before either signing this form or taking the examination, I may have an attorney present, if I cannot afford an attorney and desire one an attorney will be appointed for me prior to any questioning, and I have the opportunity to exercise all these rights at any time I wish to during the entire time I am here. Nevertheless; I consent to the use of electronic hearing and recording devices, and I voluntarily request and authorize Scientific Lie Detection, Inc. to now proceed with the actual examination.

I do hereby authorize Scientific Lie Detection, Inc., its officers, employees and or agents to disclose both orally and in writing the examination results and opinions to officers, employees, and or agents of Edgar C. NeMoyer Esq.

I am fully aware that the expert opinion may be that I have not been truthful. Notwithstanding such, in consideration of and as an inducement for Scientific Lie Detection, Inc., to give me this polygraph examination, I—for myself and my successors, assigns, heirs, executors, and administrators—hereby release, absolve, remise, convenant, prom-

Exhibit "B" Annexed to Foregoing Affidavit of NeMoyer.

ise, agree to save harmless, forever discharge, and hold free from all harm, liability, or damage to me Scientific Lie Detection, Inc., and its officers, employees, and agents individually, collectively, and personally. In adition, I knowingly remise, release, waive, and forever discharge each and all the above-named from any and all suits, actions, or causes of actions at law, claims, demands, or liabilities either in law or in equity including but not limited to false arrest, false imprisonment, libel, slander, or invasion of all my rights which I, my successors, assigns, heirs, executors, or administrators have now or may ever have resulting directly, indirectly, or remotely from my taking said examination, possible liabilities or damages flowing from the operation of all electronic hearing and recording devices, the rendered oral and written opinions and statements, and/or all future actions taken by any and/or all of the above based upon the examination.

As a further consideration and inducement to have Scientific Lie Detection, Inc., conduct the examination, I represent that not only am I in good mental and physical condition but that I know of no mental or physical ailment which might be impaired by the examination.

Important Notice: This agreement and release form is a legally binding contract. If not completely understood, do not sign but seek competent advice, such as that rendered by an attorney.

FREDERICK PORDUM 10:04
Seal (Signature of person to be examined) Time

EDGAR C. NEMOYER
Witnessed

Exhibit "B" Annexed to Foregoing Affidavit of NeMoyer.

This examination was concluded at 11:44 on the above date. I completely re-affirm in its entirety my above agreement. In addition, I knowingly and intelligently continued to waive all my rights, including those listed in the second paragraph above, and I willingly made all the statements that I did make.

I also certify that during the entire time I was well-treated, submitted myself freely to the examination knowing that I could stop any time I so desired by merely saying I wished to stop or that I wished to consult an attorney or any other person. I remained of my own free will knowing that I could leave this room at any time I so desired, and that there were no threats, promises, or any harm whatsoever done to me during the entire period I have been here, either in connection with the examination or my again signing of this agreement and release form.

FREDERICK PORDUM
Seal (Signature of person examined)

R. O. ARTHER
Witnessed

Exhibit "B" Annexed to Foregoing Affidavit of NeMoyer.

SCIENTIFIC LIE DETECTION, INC.
UTILIZING THE ARTHER II & III POLYGRAPHS
57 West 57th Street
(212) PLaza 5-5241

1109 Medical Arts Center — New York, New York 10019
Richard O. Arther, B. S. M. A. — Gene Sandacz
President — Certified Polygraphist

RICHARD O. ARTHER
President

National Training Center of Lie Detection

Board Chairman, Sec.-Treas.
Polygraph Examiners of New York State

Managing Editor
The Journal of Polygraph Studies

The Arther III Polygraph is the Most Complete Lie-Detection Polygraph in the World

Richard O. Arther graduated with honors from Michigan State University in 1951 with a Bachelor of Science degree in Police Administration. In 1960 he obtained a Master of Arts degree in Psychology from Columbia University.

Following graduation in 1951; he began his polygraph internship in Chicago at John E. Reid & Associates. His instructors were Mr. Reid and Fred E. Inbau, the noted Professor of Criminal Law at Northwestern University School of Law. After six months of intensive training, during which time he was their only student, Mr. Arther received his certificate as an expert polygraphist.

Exhibit "B" Annexed to Foregoing Affidavit of McMoyer.

He was then taken into the firm of John E. Reid & Associates as Mr. Reid's Chief Associate. While there, he was elected to do research on a new interrogational device for the Office of Naval Research. This special project took one year to complete.

Mr. Arther remained in Chicago until July 1953, at which time he came to Manhattan to establish on West 57th Street New York State's first full-time polygraph suite.

In 1964, Mr. Arther became the first President of the Polygraph Examiners of New York State, Inc., which is the official organization of the state's professional law-enforcement and private polygraphists. Since then, he has either been the Association's President or Chairman of the Board. Right now he is Board Chairman, Secretary and Treasurer of this group.

Mr. Arther is also a Charter Member of the American Polygraph Association and is the Eastern Co-ordinator of their Case Review Committee. This is the committee which conducts gratis polygraph examinations in prisons in those capital-crime cases where possibly the person is innocent.

Mr. Arther is also an Active Member of other professional organizations, including the International Association of Arson Investigators, National Counter Intelligence Corps Association, Polygraph Examiners of New Jersey, and Special Agents Association. For seventeen years, Mr. Arther has been an Associate Member of the International Association of Chiefs of Police

Exhibit "B" Annexed to Foregoing Affidavit of McMoyer.

From 1954 through 1962, Mr. Arther was on the Police Science staff of Brooklyn College, for several years he instructed the Port of New York Authority Police on interrogation and interviewing, for three years he was on the Police Science staff of Sefon Hall University; for two years he was on the staff of the Graduate School of Public Administration of New York University as well as a staff member of the John Jay College of Criminal Justice.

In 1958, Mr. Arther helped found the National Training Center of Lie Detection. Since 1964 he has been both its Director and President. There he has given the basic polygraph training to over 300 polygraphists for various Federal, state, and local law-enforcement agencies, including the United States Army, Coast Guard, and Marine Corps.

In the past six years over 500 polygraphists have attended his various polygraph seminars, which he conducts several times a year throughout the country.

Mr. Arther has personally given polygraph examinations to over 17,000 persons. Over 900 times Mr. Arther's testing has been done for the purpose of having his expert opinion admitted into court evidence.

The Arther III Polygraph, which was designed and manufactured according to his specifications, is the most complete lie-detection instrument in use today anywhere in the world.

For professional journals Mr. Arther has contributed over 90 articles dealing with the polygraph, interrogation, and scientific investigation. In addition, in 1953 he materially assisted Fred E. Inbau and John E. Reid in writing

Exhibit "B" Annexed to Foregoing Affidavit of McMoyer.

the third edition of *Lie Detection and Criminal Interrogation.*

Mr. Arther is Senior Author of *Interrogation for Investigators,* which many regard as the country's leading interrogation text. He is also the author of the noted college text, *The Scientific Investigator.* In addition, he founded and from the start has been the Managing Editor of the only professional polygraph publication, *The Journal of Polygraph Studies.*

Mr. Arther was first listed in *Leaders In American Science* in 1962. His name also has appeared in other biographical publications, including the past two issues of *Who's Who in the East* and the current *World Who's Who in Finance and Industry.*

January 1971

Appendix "I"

ORAL ARGUMENTS ON POLYGRAPH MOTION AND COURT'S DENIAL

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Cr. 1971-11.

UNITED STATES OF AMERICA,

vs.

FREDERICK PORDUM,

Defendant.

Proceedings held in the above entitled action before the Hon. John O. Henderson, United States District Judge in and for the Western District of New York, at Buffalo, New York, on Monday, December 20, 1971.

Appearances:

H. Kenneth Schroeder, Jr., United States Attorney, by James W. Richards, Esq., Department of Justice, appearing on behalf of the Government.

Edgar NeMoyer, Esq., appearing on behalf of the Defendant.

Mr. NeMoyer: Your Honor, this is my motion. I am bringing it on to ask you to direct the Government to give Mr. Pordum a polygraph examination, your Honor. We have had two of them. We understand that the Govern-

ment has people in their employ that do these, and we request that you direct them to give us a polygraph, that is what we are asking your Honor. I don't know if the Government is objecting.

The Court: We will probably hear in a minute. Do you want to say anything more?

Mr. NeMoyer: No, your Honor, I do not.

Mr. Richards: If your Honor please, I certainly do object. In fact, I believe I informed Mr. NeMoyer when he was first retained in this matter and told me that he intended to petition the Circuit Court, the Second Circuit, for a re-hearing on the affirmance of the conviction, and I would like to state my grounds, assuming *arguendo* that the defendant is properly before this Court, which I will argue he is not, and the Government—

The Court: The question I wanted to raise with you, Mr. NeMoyer, if you don't mind my interrupting—

Mr. Richards: Not at all.

The Court: —as I understand this, you have petitioned the Second Circuit along the same lines, for a re-hearing based upon some polygraph tests, and that has been denied. You are now seeking, as I understand it, certiorari to the Supreme Court of the United States for the same relief.

Mr. NeMoyer: No, it isn't the same relief. We did not ask the Second Circuit to act in the nature of mandamus, what we asked the Second Circuit—

The Court: Mandamus?

Mr. NeMoyer: In the nature thereof, your Honor, to direct the Government to do a certain function. We asked the Second Circuit to grant us a re-hearing, not a—

The Court: It was on the basis, as I remember, of certain alleged polygraph tests.

Oral Arguments on Polygraph Motion and Court's Denial.

Mr. NeMoyer: Among other things, your Honor, I think our main contention was a legal argument, to wit, that this was primarily a state action, under Erie-Tompkins Doctrine should have used state rules, not federal rules. This was quite a bit different than what we are asking here. Here we are asking for the Government to be directed to do something; in the Second Circuit we just wanted a rehearing to argue legal matters arising out of the trial.

The Court: This case went to a jury, went on appeal, was affirmed. Now I don't quite understand how you expect me to conduct—on your behalf order the conduction of polygraph tests. Where is the theory of *res judicata* here? I do not understand. I have never run into this before, an appeal like this.

Mr. NeMoyer: I don't contend that the results of that examination are going to set aside any jury verdict, your Honor. I just think in the interest of justice and in the interest of a complete investigation that the Government conduct certain things. The results—

The Court: If it has no effect upon the conviction, what are we doing here?

Mr. NeMoyer: I think, your Honor, more knowledge, a fuller investigation, can't hurt anything.

The Court: I suppose that is true of every case, but is there no finality here to the disposition of a criminal case? I suppose you could go on forever with respect to a case. I have never heard that kind of an argument, "it doesn't hurt anything."

Mr. NeMoyer: Your Honor, this may be a *de novo* argument here; but it is not *de novo* in the State of New York. Your Honor, this isn't going to affect the finality at all right now, even time-wise. For example, our peti-

tion for a writ of certiorari has to be in the Supreme Court by January 5th. This motion, as far as I'm concerned, has no effect on that date. We are just asking, if the Government has these people, your Honor, they must have some faith and belief in them, we are just asking them to utilize people and equipment they have.

The Court: I suppose they've got a lot of equipment of all nature that they have, but I don't understand what we are exploring here.

Mr. McMoyer: We are exploring whether Fred Pordum was telling the truth when he took a previous lie detector or whether the chief Government witness was telling the truth.

The Court: He testified, the chief Government witness, and the jury obviously believed him. Mr. Pordum did not testify in the case at all. Well, let me hear what Mr. Richards has to say.

Mr. Richards: Your Honor, I have never been confronted with a motion where counsel candidly concedes the reason for making it is that it would be a nice thing. The motions that have been filed on the so-called lie detectors, which they used as point one in their petition for re-hearing to the Second Circuit Court of Appeals, and the Second Circuit promptly denied that re-hearing, is an exercise in futility. They have no standing before this Court. We can't just run roughshod over the rules. This defendant has deliberately removed himself from the jurisdiction of this Court by pursuing, as is his perfect right, his appellate remedies. Now, the only conceivable way that the defendant could be before this Court is either on Rule 33 or Rule 35. Now, with regard to Rule 33, which has to do with a motion for a new trial within seven days or an ex-

tension within that seven days, that time has run, so that is not proper, or a motion for newly discovered evidence under Rule 33 may be brought two years after judgment, but it has to be—such a motion has to be brought on remand to the district court. The case is in such a posture now that the defendant, by pursuing his appellate remedies, has delayed the issuance of the mandate back to this Court so that jurisdiction for such motions would attach, and, furthermore, the defendant has announced his intention, through his counsel, to ask for certiorari to the Supreme Court, which again removes it from the jurisdiction of this Court. This is all conceding under the most liberal interpretation of Rule 33 that this might be construed as newly discovered evidence. Now, surprisingly enough, there is some law on this, this has been tried before, in fact, it has been tried in the Second Circuit. I invite the Court's attention, and counsel's attention, to the case of United States versus Stromberg, 179 Fed. Sup. 278, out of the Southern District of New York in 1959. Incidentally, this is an opinion by Judge Kaufman, who is now on the Second Circuit and, of course, was on the panel that handled the appeal of this defendant a month ago. But anyway, after denying the results of a lie detector after conviction, and here we have it, of course, after affirmance of conviction, Judge Kaufman had this to say, and I am going to quote him at Page 280 of the opinion: "My decision is not based merely on precedent strong though it is. The most important function served by a jury is bringing its accumulated experience to bear upon witnesses testifying before it, in order to distinguish truth from falsity. Such a process is of enormous complexity and involves an almost infinite number of variable factors. It is the

basic premise of the jury system that twelve men and women can harmonize those variables and decide, with the aid of examination and cross examination, the truthfulness of a witness. But a machine cannot be examined or cross examined. Its testimony, as interpreted by an expert is in that sense the most glaring and blatant hearsay. Though the defendants cite in their briefs certain articles, which they contend establish the scientific accuracy of the polygraph tests, I am not prepared to rule that the jury system is as yet outmoded. I still prefer the collective judgment of twelve men and women, who have sat through many weeks of trial, and have heard all the evidence on the guilt or innocence of the defendant."

I further point out, your Honor, that no courts, state or federal, has ever admitted the results of lie detectors. This is readily available—

The Court: You mean without stipulation.

Mr. Richards: Except on stipulation. I was about to add, there are five states out of the twenty-nine, who have ruled on it, who do allow the use of lie detectors upon stipulation of both parties at trial. Illustrative of this is the Arizona rule which allows, upon stipulation of both parties, at trial the use of results of lie detectors, not for the ultimate fact of guilt or innocence, but for use in cross examination, to corroborate or impeach witnesses or the defendant when he takes the stand.

The posture of this case is such that even if the defendant had had his results of his lie detector at trial, and even if the Government had stipulated, it still would not have been admissible because he did not take the stand. So even under the most liberal interpretation, the Arizona rule, this is one of five states which so holds upon stipulation, the

other twenty-four states just flatly say they are not admissible.

So what I submit is, your Honor, the defendant is not properly here, even assuming those facts, under Rule 33, or if we were to give a liberal interpretation to Rule 35, that is, a motion for reduction of sentence, that the defendant is not properly here on that rule, because, as your Honor knows, that rule provides that motions for reduction of sentence shall be made within one hundred and twenty days of judgment, which was July 6th, that time has passed, or within one hundred and twenty days of when the mandate comes back from the Circuit or a final disposition is made by the United States Supreme Court on a petition of certiorari, and that time has not yet begun to run. The defendant by his own motion, by his own action, pursuing his appellate remedies, has removed himself from the jurisdiction of this Court, and the government does not propose to engage in this kind of an exercise. That, briefly stated, is the Government's position.

The Court: Let me ask you, Mr. NeMoyer, originally Mr. Biondolillo represented Mr. Pordum. I have never heard, but it must be the fact, that he has withdrawn now?

Mr. NeMoyer: Yes, your Honor.

The Court: You represent him now for all purposes?

Mr. NeMoyer: Yes. Mr. Mahoney represented him on appeal, your Honor.

The Court: Pordum?

Mr. NeMoyer: Yes. I have talked to Mr. Mahoney, and I am representing him now. Mr. Mahoney has withdrawn.

Your Honor, there are a couple of points in contradiction to what Mr. Richards has said. He said that polygraph has never been—

Oral Arguments on Polygraph Motion and Court's Denial.

The Court: Let me ask you if you have read United States against Stromberg?

Mr. NeMoyer: No, I haven't.

The Court: Are you familiar with it?

Mr. NeMoyer: No, I'm not. It is a Fed. Sup. case and not controlling. I have a case, People versus Kenny, apparently he didn't read, your Honor, in the State of New York, where there was a conviction for robbery, as a second offender, there was a polygraph examination, and the court took a very strong position in that case, your Honor, that the polygraph results constituted newly discovered evidence and set aside that conviction. That is 3 New York Sup. Second 348. But that also, like a Fed. Sup. is not controlling on you. I just say that in some instances it has been admitted in.

Your Honor, I have a Law Review article here, I would like to read the first paragraph, and part of the reason we are here, your Honor, is in fairness, it says here: "The purpose of this paper is to suggest that time has come for the courts to admit polygraph tests into evidence on behalf of a defendant in a criminal case. After establishing the proper foundation the defendant should be permitted to present evidence as a result of his own polygraph examination if he is willing also to submit to such an examination by a qualified polygraph examiner of the prosecution's choosing." I am citing from the New York State Bar Journal, your Honor.

The Court: You are talking about pending trial, are you not, there?

Mr. NeMoyer: Well—

The Court: That is long ago and far away here in this case.

Mr. NeMoyer: What we have here, your Honor, look, the papers have picked this up—

The Court: I am looking, hard.

Mr. NeMoyer: In fairness, we have come in with two examiners, and people are saying, 'Well, they have picked them.' We are saying now, in fairness, give the Government their shot.

The Court: Shot at what?

Mr. NeMoyer: At examining him with their own expert. They have people qualified to do this, your Honor, and if they don't have any faith in it, I don't see why they have those people on their staff on salary, and equipment.

The Court: I have never heard an argument like that in my life before. Anything further?

Mr. NeMoyer: No, your Honor.

The Court: Denied.

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Supreme Court, U.S.
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Nos. 71-871 and 71-5890

In the Supreme Court of the United States

OCTOBER TERM, 1971

FREDERICK PORDUM, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK C. LUDERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of New York, petitioners, former county legislators, were convicted of conspiracy to travel and to cause travel in interstate commerce to facilitate bribery, in violation of 18 U.S.C. 1952.[1] Each petitioner was sentenced to three

[1] Petitioners were acquitted on three counts charging substantive crimes.